IN THE

Supreme Court of the United States

October Term, 1922

No. 216

COMMONWEALTH TRUST COMPANY OF PITTSBURGH, a Corporation, Trustee,
Appellant,

vs.

MAX SMITH AND MARGARET SMITH,
Appellees.

Appeal From the Circuit Court of Appeals for the Ninth Circuit.

Brief of Appellee

TURNER K. HACKMAN,
Solicitor for Appellee,
Residence: Twin Falls, Idaho.

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STATEMENT OF THE CASE ON BEHALF OF APPELLEE

Appellant is correct concerning the statement that appellant was a trustee, etc, and that the said water contracts involved in this action had been assigned to appellant by a construction company.

We take issue, however, upon the further statement that default in payment had been made by Max Smith and Margaret Smith in the payment of installments of principal and interest due under their contracts. The fact is true, however, that the suit was brought upon the theory that such default had occurred. Our contention is that the construction company failed to carry out its contract by furnishing an ample supply of water for the reclamation of lands purchased by appellees in accordance with the provisions of what is known as the Carey Act and Amendments thereto, so as to reclaim the lands purchased by appellees; that there was, therefore, nothing due under the contract until the construction company had fully complied with the provisions of the said Carey Act and the Amendments thereto.

Appellant's bill was dismissed because of its failure to join as defendants in the suit all other persons as parties, having any interest or water rights in the irrigation system constructed by the construction company, and that had the requirements of said decree been fully complied with there would have been added to the action a considerable number of defendants, perhaps about 500 to 700, according to our understanding.

It is further true that in this particular action appellant asks no relief against any other water user or land owner on the project, but it is a fact that appellant has instituted over 88 similar suits

against other purchasers of water rights and of land on the same project, in the Federal Court, and over 300 similar actions in the state District Court for Twin Falls County.

Appellant in its bill of complaint alleges that the land board of the State of Idaho did apply under the Carey Act for the segregation of 127,707.29 acres of desert land situated in Twin Falls County, State of Idaho, which lands, and other arid lands in the vicinity thereof making an aggregate of about 150,000 acres could be irrigated from surplus and unappropriated water of the Salmon River (Par. 3, pp 2 and 3, Record), and that it was determined by the State of Idaho and the Construction Company and agreed in the Contract between the State and said company that the "Necessary expenses of reclamation and reasonable interest thereon would be the sum of $40.00 per acre when apportioned or distributed eually over the whole 150,000 acres proposed to be reclaimed therefrom," that a lien was created by the State pursuant to the Federal Carey Act; (paragraph 4, pages 3 and 4, Record) that after the construction company had commenced the construction works, the State of Idaho demanded that the segregation be reduced to 100,000 acres and later on demanded that the segregation be cut to 80,000 acres and shares or water rights be limited to 80,000 acres (paragraph 6, page 5, Record.)

"That under said Acts of Congress and the laws

of Idaho and the said contract between the Construction Company and the State of Idaho, and the settler's contracts, the construction company became entitled to and possessed of a lien authorized to be created by the State of Idaho under the said Acts of Congress, against the lands segregated from the public domain, as aforesaid, for the actual cost of constructing said irrigation system and the necessary expense of reclamation and reasonable interest thereon," etc., (paragraph 9, pages 6 and 7, Record.)

That the construction company sold "approximately 73,000 shares or interests for the irrigation of approximately 73,000 acres;" that the contracts were approved by the State Land Board, but that afterwards, in the year 1916, the said Land Board cancelled approximately 13,000 acres of these contracts, reducing the outstanding contracts to approximately 60,070.8 acres, shares or interests, and declined to approve any further contracts (paragraph 10, page 7, Record.)

That subsequently, in the month of March, 1918, the land board entered an order that the water from the system should "be distributed and made appurtenant to 35,000 net irrigable acres and no more"; and that all other contracts in excess of that be cancelled (paragraph 10, page 21, Record.) Appellant then alleges that if the order of the land board of March, 1918, limiting the net irrigable acres to 35,000 acres be legal and valid "the mon-

eys expended by the Construction Company in the construction of said irrigation system can only be recovered through or by enforcement of its lien against such acreage; that if the irrigable acreage be limited and restricted to 60,070.8 acres, the actual cost and necessary expense of reclamation and reasonable interest thereon will amount to not less than $60.00 per acre, and in the event said acreage be further reduced, the cost per acre will be increased proportionately" (paragraph 10, page 8, Record.)

Appellant then alleges that appellees made default in payment, and demand its alleged lien be enforced against appellee's lands described in the bill of complaint (paragraph 11, pages 9 and 10, Record.)

Then comes appellant's prayer for relief, including the following: "That plaintiff be decreed to have a first and prior lien upon the lands and premises described in paragraph XI of the bill of complaint, and on the appurtenant shares and interests in said irrigation system and the shares of stock in the Salmon River Canal Company, Ltd., representing such shares and interests and pledged as additional security for said indebtedness, and that the amount due plaintiff may be ascertained and determined, and the usual decree made for the foreclosure of plaintiff's lien against said lands, premises and property, and for the payment of the amount due plaintiff as claimed in

paragraph XI of its bill of complaint, and for the sale of said premises and property to satisfy and discharge plaintiff's said claim."

It will, therefore, be observed, that appellant is not setting up a certain definite and single lien against appellees, but that appellant is demanding that recovery be had and a lien declared against appellee's lands founded upon and absolutely resting upon, the provisions of the Federal Carey Act and amendments thereto, and that the amount due under said lien be based upon the total cost of constructing the entire system, and that this total amount be pro-rated among all share holders as against THEIR INTEREST IN THE ENTIRE SYSTEM AND AGAINST THEIR SEPARATE LAND PURCHASES; and that appellant is demanding that the original amount specified in its contract with appellees shall be increased in proportion as the entire acreage was reduced by order of the land board, and that in its foreclosure proceedings appellant be allowed, not only to sell the separate parcels of land owned by appellees, but also their undivided interest in the entire water system and their water rights. (See paragraph 11, pages 9 and 10, Record.)

Appellees, in their answer, take issue with appellant, first in regard to the amount which appellant contends was expended by the construction company, appellant contending that the construction company expended "upwards of $3,500,000.00

in the construction of said irrigation works and in carrying out the terms of said contract'' (paragraph 4, pages 15 and 16, Record.)

Appellees allege "that the construction work done upon said project or segregation was done by the American Waterworks and Guaranty Company, and by W. S. Kuhn and James S. Kuhn, of Pittsburgh, Pennsylvania, and their associates, and the said construction company did not pay out or expend, or incur" liability exceeding the sum of $1,000,000.00 in and upon said construction work (paragraph 5, page 14, Record.)

After admitting and denying various allegations of the complaint, appellees then set up as an affirmative defense the charge that the original promoters of this segregation represented that they had done a great deal of engineering work, had examined into the water supply, and requested that the segregation be asked for by the State Land Board of the Interior Department (pages 26 and 27, Record.)

That the segregation was made; that the construction company took over the rights and interests of the original promoters, and placed a deed of trust lien upon the dam and entire system for $2,000,000.00; that said deed of trust covered all lands, water rights, and in fact everything which could be claimed by the Construction Company under the segregation (page 29, Record.)

That included in the property placed under the deed of trust were all contracts, notes and mortgages acquired by the company in the sale of water rights that should be assigned by the company to the trustee (appellant herein), that this mortgage was made "SUBJECT TO ALL OF THE PROVISIONS IN THE CONTRACT BETWEEN THE STATE OF IDAHO, THROUGH THE STATE BOARD OF LAND COMMISSIONERS AND THE COMPANY, DATED APRIL 30TH, 1908, AND THE PROVISIONS OF THE ACT OF CONGRESS, KNOWN AS THE 'CAREY ACT' AND THE ACTS AMENDATORY THEREOF, AND THE LAWS OF THE STATE OF IDAHO, ACCEPTING THE TERMS OF THE CAREY ACT, AND IS ALSO SUBJECT TO THE PROVISIONS OF THE CONTRACT BETWEEN THE UNITED STATES OF AMERICA AND THE STATE OF IDAHO, SEGREGATING THE CAREY ACT LANDS REFERRED TO HEREIN" (page 29, Record.)

That said deed of trust further provides that if the company should fail to carry out its contract it would waive service of process and would consent to a receivership as to all of its rights and interests growing out of the creation of said irrigation system (pages 30-31, Record.)

Appellees further allege in their answer that appellant acquired by assignment all water contracts including the one sued upon, with full knowledge

of the provisions of the Carey Act, the State Laws and the provisions of the deed of trust (page 31, Record.)

That the construction company advertised the water rights to be without a flaw and beyond contest, and as ample to irrigate the entire segregation, to-wit: 150,000 acres; that said representations were false and deceptive, and that appellees and all other purchasers of water rights and of lands, relied upon such representations and were deceived (pages 31-32, Record.)

That not only was there an insufficient water supply, but that there was a prior water right of 12,500 acre feet of water (page 33, Record.)

That there was a further representation that the company owned water rights other than from the Salmon River; that this statement was made for the purpose of deceiving and defrauding; that the construction company had no such water rights (page 33, Record.)

After alleging the absolute failure of the company to comply with the provisions of the Carey Act, and alleging that it has no lien until it has complied with the terms of said act, appellees then allege that the company can acquire other water rights that will enable it to properly irrigate 90,000 acres of land (page 38, Record.)

That certain lands have been selected under what is known as the "Whiffen Report" for the

purpose of having all water from the system applied to these lands; that this embraces the 35,000 acres of land already referred to, and that all other lands were to be eliminated (page 39 Record).

Appellees then pray that by reason of the claim of appellant that its charges for water rights should be increased, and by reason of its failure to comply with the provisions of the Carey Act laws, and because of the fact that it had consented, upon its failure to comply with the contract, for the appointment of a receiver; and by reason of the fact that it can acquire other water rights and should do so, that all parties who have purchased lands and water rights should be brought into the action and a receiver appointed so that other water might be obtained, and whether or not such additional water right is or can be obtained, and the rights of the purchasers of lands and water rights *inter sesee,* on the one hand and as between themselves and the bondholders on the other, might be settled, including an ascertainment of the amount actually expended and owing to the construction company and to the bondholders, who hold the contracts sued upon, under the terms of the deed of trust as hereinbefore stated, as collateral security for the payment of said bonds.

SPECIFICATIONS OF ERRORS.

The only specification of error which we deem essential to argue on this appeal, is the one designated as Error No. 6, by appellant, reading:

> "The Court erred in holding and deciding that the amount due from appellees to appellant could not be ascertained and determined in this cause without the presence of other parties."

BRIEF OF THE ARGUMENT.

Decree Appealed From Is in Accordance With Fundamental Principles of Equity.

According to our view of the law which is involved in this suit, the decree appealed from is in strict accordance with elementary and fundamental principles governing suits in equity.

> As shown in the opinion of the trial Court: "Observation and experience in relation to litigation growing out of the project have served to deepen the conviction that this question ought first to be conclusively adjudicated in a proceeding binding upon all interested parties. Out of it primarily the numerous suits now pending in this and the state courts have arisen, and because of it other cases in still greater number are likely to follow. And yet with all the litigation, some of which has been pending for an undesirable length of time, no real progress seems to have been made, owing to the want of necessary parties in any given case. From their attitude in this

and other pending suits it is to be inferred that the plaintiff and the company are, to say the least, disinclined to seek a general, binding adjudication. But with this issue unsettled it has become so manifest that a decree of foreclosure may do great injustice to one or the other of the parties, that a court of equity must seriously consider whether, to avoid such possible injustice to the defendant, it must not either afford to him an opportunity to have the requisite adjudication or resolve such doubt as there may be in his favor; or decline to entertain the suit at all. (Page 69, Record).

"There was not even an averment—unless it be by inference or implication—that the company had performed or was able and willing to perform its obligations under the contract. Had such an allegation been made, and had the writings been pleaded in full, together with other uncontroverted facts, it would have appeared that while the contracts between the numerous settlers and the company are several, they are all of the same form and all refer to and adopt as a part of the agreement the contract between the company and the state, and thus in a very substantial sense all the settlers are parties to one general contract, in the subject matter of which all are interested and by virtue of which all have rights so interdependent, whether they be regarded as joint or several, that the interest of one cannot be defined or adjudicated without affecting the interests of all others; hence an averment of due performance would in a general way, tender the issue which the defend-

ants have pleaded as an affirmative defense, and to that issue, it might with much reason be contended, all the settlers are necessary parties. But however that may be, it is thought that the amended complaint now presents such an issue. Plainly the case is no longer one strictly in foreclosure of a contract lien. While it may not be said that the original cause of action has been expressly or entirely abandoned, it is completely overshadowed by a new theory resting upon additional, if not inconsistent allegations of fact." (Pages 69-70, Record).

PRINCIPLES OF EQUITY UPON WHICH DECREE IN QUESTION IS BASED.

"Practice in Equity Where Parties Entitled to Contribution Are Numerous.—But there are many difficulties in proceeding in cases where an apportionment of contribution is allowed at the common law; for where the parties are numerous, as each is liable to contribute only for his own portion, separate actions and verdicts may become necessary against each. And thus a multiplicity of suits may take place, and no judgment in one suit will be conclusive in regard to the amount of contribution in a suit against another person. The like difficulty may arise in cases where an apportionment is to be made under a contract for the payment of money or rent where the parties are numerous and the circumstances complicated. Whereas in equity all parties can at once be brought before the court in a single suit and the decree appor-

tioning the rent will thus be conclusive upon all the parties in interest."

Story's Equity Jurisprudence, Vol. 2, 4th Edition, Sec. 640.

"But the ground of equity jurisdiction, in cases of apportionment of rent and other charges and claims, does not arise solely from the defective nature of the remedy at common law, where such remedy exists. It extends to a great variety of cases where no remedy at all exists in law, and yet where, *ex aequo et bono,* the party is entitled to relief. Thus for instance where a plaintiff was lessee of divers lands upon which an entire rent was reserved, and afterwards the inhabitants of the town where part of the lands lay claimed a right of common in part of the lands so let, and upon a trial succeeded in establishing their right—in this case there could be no apportionment of rent at law, because, although a right of common was recovered. there was no eviction of the land. But it was not doubted that in a bill in equity a bill was maintainable for an apportionment if a suitable case for relief were made out. So where by an ancient composition a rent is payable in lieu of tithes, and the lands come into seisin and possession of divers grantees, the composition will be apportioned among them in equity, though there may be no redress at law. So where money is to be laid out in land, if the party who is entitled to the land in fee when purchased dies before it is purchased, the money being in the meantime secured on a mortgage and the interest made payable half yearly, the interest will be appor-

tioned in equity between the heir and the administrator of the party so entitled if he dies before the half-yearly payment is due."

Story's Equity Jurisprudence, Vol. 2, 4th Edition, Sec. 641.

"Among the other doctrines derived from the principle that equality is equity as their source are the following: * * * The apportionment of the money secured by mortgages or other encumbrances among the various owners of the different parcels into which the mortgaged premises have been divided. Whenever a mortgage or other encumbrance has been placed upon a tract of land, and the tract is subsequently conveyed, subject to the mortgage, in parcels to different owners, or liens or other interests in distinct portions of the land are subsequently acquired by different persons, in adjusting the payment of the whole mortgage debt, either voluntarily by way of redemption, or forcibly by way of foreclosure, equity applies, unless some other controlling equitable consideration interfere, the principle of equality; in other words, equity makes a pro rata apportionment among all the owners of parcels and holders of liens or interests."

Pomeroy's Equity Jurisprudence, Vol 1, 4th Edition, Sec. 411.

A court of equity cannot make a final decree until all parties essential to the merits of the question are brought in.

Persons having rights which must be affected by the decree cannot be dispensed with.

The most recent case involving the question of water rights upon the Salmon River Project (which is the name of this original project) was one involving the interests of the owner of a water right on the excluded area. The Supreme Court of the State of Idaho, in an opinion handed down July 2, 1921, among other things held that:

> "The right to a continued use of water arising from its beneficial use in the past under a Carey Act contract cannot be divested by action of the Secretary of the Interior, of the State Land Board, or of the Commissioner of Reclamation.
>
> "Where plaintiff, an entryman on a Carey Act project, has beneficially used water delivered to him under his contract, an agreement between the Secretary of the Interior and the State Land Board that only certain lands within the project shall be patented, that plaintiff's land shall not be patented, but relinquished by the state, and that the available water shall all be appurtenant to the lands selected for patent, does not divest plaintiff of his right to the continued use of the water. Such facts do not vest in the owners of the patented land any right to the use of the water superior to or adverse to the plaintiff's.
>
> "One who has appropriated water and beneficially used it has a right to use it independent of his ownership of the land."
>
> Syllabus in Sanderson vs. Salmon River Canal Company, Ltd., 34 Ida. at Page 145, 199 Pac. at Page 999.

The above decision was in a writ of mandamus action and notwithstanding the fact that the plea of a lack of parties was entered, the Court decided this case without the presence of the appellees herein, or any other settlers within or without the patented area. This is another illustration of the difficulties encountered upon Carey Act Projects where there is a deficiency in the water supply, and decisions are entered without all parties being before the Court, resulting in confusion and an inability to arrive at a just and proper result on behalf of the settlers.

Where parties indispensable to a decree are not before the court, the bill must be dismissed.

Shields vs. Barrow, 17, How. 130-146 (58 U. S. 129-140), 15 L. Ed. 158.

FUNDAMENTAL PRINCIPLES UPON WHICH RIGHTS OF PARTIES MUST BE DETERMINED.

In order to arrive at a thorough understanding of the questions involved in this litigation there should be kept in mind the following propositions of law which are fundamental under our system of government, and which lie at the very foundation of the rights of appellant and of each and every purchase of land or water rights within the boundaries of the original segregation. They are as follows: (1) That the fundamental law involved is that of the Federal Statute known as the

"Carey Act" and the amendments thereto; that under the constitution of the United States these statutes are paramount laws, governing all rights under the segregation. (2) That next comes the contract between the President of the United States and the Secretary of the Interior under and by virtue of said Federal Statutes, and the Governor and Land Board of the State of Idaho, under the laws of said State. (3) The laws of the State of Idaho. (4) The contract between the State of Idaho and the Construction Company, and the contract between the construction company and the settler.

Frequently in construing the Federal Statutes, the State laws, and the various contracts herein referred to, the courts in considering all the questions involved thereunder, and the purpose of the various laws and contracts, apparently overlook the fact that the Federal Statutes must constantly be kept in mind as paramount; that the State laws must be read in subordination to the Federal law, and that the contracts between the State and the Construction Company, and between the Construction Company and the settler must all be read, construed and interpreted in subordination to, (1) the Federal Statutes and (2) the State law. We repeat this question of law has not always been kept in mind clearly in deciding the difficulties arising on Carey Act segregations.

We, therefore, contend that this action arises

out of, and is founded upon, the provisions of the Federal Statutes, and that it is immaterial whether appellant asks for an increased recovery from appellees, and other purchasers of land and water rights, or only asks to enforce alleged liens for the contract price of $40.00 per acre, it is not entitled to enforce its contract until the Construction Company, or appellant, has complied with the terms of the Federal Statutes, and the requirements of the Contract between the United States Government and the State of Idaho, which expressly provides:

> "It is distinctly understood and fully agreed that all persons acquiring rights to said lands in said state prior to the issuance of patents, as hereinafter mentioned, will take the same subject to all the requirements of said Acts of Congress and to the terms of this contract, and shall show FULL COMPLIANCE THEREWITH BEFORE THEY SHALL HAVE ANY CLAIM AGAINST THE UNITED STATES FOR A PATENT TO SAID LAND" (page 35, Record.)

Therefore appellant could claim no lien prior to the acquirement of a patent.

Under the laws of the State of Idaho, the water right does not become appurtenant to the land until patent issues, and not until then does a construction company obtain a lien upon the land and water right.

(Sec. 3018 Compiled Statutes, 1919.)

Under the terms of the water contract, the purchaser simply assigns "by way of mortgage or pledge to the company" all rights which he then has, or which may accrue to him under the contract with the State for the purchase of lands, "and further that immediately upon transfer to him of the legal title to said lands or any part thereof, he will, upon demand, execute to the company, in proper form, a mortgage or deed of trust with power of sale, in such form as may be approved by the State Board of Land Commissioners, to secure the performance by him of the provisions of this contract; which said mortgage the purchaser hereby covenants and agrees shall be a first lien upon the lands so mortgaged, superior to any and every encumbrance in favor of any persons whomsoever."

(Page 65, Transcript of Record.)

We contend, therefore, that this contract, as above stated, must be read, in subordination to the provisions, first of the Federal Statutes; second, the State Statutes, which State Statutes we must bear in mind, must themselves, be read in subordination to the Federal Statutes. Thus, we are brought to the inevitable conclusion, and, to our mind, the incontrovertible position that the contract in question is not a mortgage, and the suit in which an attempt to foreclose is made (as is the case in this action), is premature and has no basis in law as a foreclosure suit. We must bear in

mind that the settler, or purchaser of a water contract, simply agrees that he will execute a mortgage, and until such instrument is executed, the Construction Company and the Assignees of its water contracts must first reclaim the lands, and, after reclaiming the land, rely upon its lien given by virtue of the Federal and State Statutes, and this lien is upon the entire segregation actually reclaimed, or legal subdivisions thereof. This is the situation until the settler finally executes an actual mortgage, after the title has been acquired from the Federal Government.

Of equal importance is the fact that the lien provided for by the laws of the State of Idaho gives a special remedy for the enforcement of said lien, and that remedy is exclusive.

The laws in force at the time this segregation was opened for settlement contained provisions as to the enforcement of the lien of the construction company against the settler as follows:

> "Upon default of any of the deferred payments secured by any lien under the provisions of this chapter, the person, company of persons, association or incorporated company, holding or owning said lien, may foreclose the same according to the terms and conditions of the contract granting and selling to the settler the water right. All sales shall be advertised in a newspaper of general circulation, published in the county where said land and water right is situate, for six consecutive weeks, and shall be sold to the highest bidder

at the front door of the court house of the county, or such place as may be agreed upon by the terms of the aforesaid contract. And the sheriff of said county shall in all such cases give all notices of sale, and shall sell all such lands and water rights, and shall make and execute a certificate of sale to the purchaser thereof. And at such sale no person, company of persons, association or incorporated company, owning and holding any lien, shall bid in or purchase any land or water right at a greater price than the amount due on said deferred payment for said water right and the costs incurred in making the sale of said land and water right."

Idaho Revised Codes, 1908, *Sec.* 1629.

"The federal government when making the grant of the Carey Act land to the state authorized the creation of a lien thereon for the cost of the construction of the works (29 Stats. at Large 434), and the state, by legislative enactment (Sec. 3288, Rev. Codes), created a lien on both the land and the water right to insure to the construction company a return of the initial cost of construction and a reasonable profit on the investment (*Childs v. Neitzel*) (on rehearing), (26 Ida. 133, 141 Pac. 77). Two separate and distinct liens were thereby created to secure the payment of the cost of the construction of the works and the operation. One was a lien on the land itself, which lien attaches when the necessary proof has been made by the entryman and patent issued to the state and a conveyance by the state to the entryman. The existence of this lien depends primarily

upon the completion of the construction works and the delivery of water through the works by the construction company as stipulated in its contracts with both the state and the entryman. The other was a lien on the water right, which, under the terms of the contract, is mortgaged or pledged to the construction company." * * *

"The construction company, under the terms of the contract, upon the failure of the entryman to make payment of principal or interest as therein specified, is authorized to declare the entire indebtedness due. In our opinion, when it so declares the indebtedness due, it becomes vested with the right to proceed as provided by section 1629, Rev. Codes. Said section of the statutes authorizes the lien and foreclosure for the purchase price of the water right contracted for, and is to the effect that the construction company securing water for any tract of land 'shall have a first and prior lien on said water right and land upon which said water is used, for all deferred payments for said water right; said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land; said lien to remain in full force and effect until the last deferred payment for the water right is fully paid and satisfied according to the terms of the contract under which said water right was acquired.'

"Then follows the remedy provided in the event the unpaid purchase price of the water right shall not have been paid. It is provided that upon default of deferred payments

secured by any of the liens under the provisions of this chapter, the construction company holding or owning said lien 'may foreclose the same according to the terms and conditions of the contract granting and selling to the settler the water right.'

"Next follows the provision with reference to the manner of foreclosure, the publication of notice and the sale by the sheriff, at which sale it is provided that no person or company owning or holding any lien shall bid in or purchase any land or water right 'at a greater price than the amount due on said deferred payment for said water right and land, and the costs incurred in making the sale of said land and water right."

Adams vs. Twin Falls-Oakley L. & W. Co., 29 Idaho, 370-372.

"It is apparent that the legislature intended to fully protect the construction company to the extent that it be reimbursed for the moneys expended in the construction of the works, together with reasonable profit on the investment. To this end it provided the statutory liens heretofore defined and a complete, exclusive statutory procedure for the foreclosure of these liens."

Same authority, page 374.

"The liability and the remedy were created by the same statute. This being so, the remedy provided is exclusive of all others. A general liability created by statute without a remedy, may be enforced by an appropriate common law action, but when the provision for the liability is coupled with the provision

for a special remedy, that remedy, and that remedy alone, must be employed."

Pollard vs. Bailey, 20 Wall, 520-527 (22 L. Ed. 376).

As the attempt to enforce payment under the settlers' contracts must be made according to the exclusive remedy given by the statute, appellant has no standing in a court of equity to proceed as though the enforcement of an ordinary common law mortgage were involved.

The statute in question provides that the procedure should be had to foreclose the contract "according to the terms and conditions of the contract granting and selling to the settler the water right." We now turn to the contract and find that it provides:

"The purchaser hereby covenants and agrees that upon default in the payment of any of the payments above specified, or of the interest thereon, or any annual charge, toll or assessment, for the operation and maintenance of the irrigation system hereinbefore provided for, the Company may declare the entire amount of the principal purchase price for said water rights, due, and may proceed either in law or in equity to collect the same, and to enforce any lien which it may have upon the water rights hereby contracted, or upon the lands to which said water rights are dedicated or may at its option proceed to enforce any remedy given by the laws of Idaho to the Company against the purchaser."

(Page 64 Transcript of Record).

Therefore, under the terms of the contract, no proceedings can be had until there is default by the settler, and the only remedy against him after default is that given by the foregoing provisions of the Idaho laws, and as the contract has to be read in subordination to the Federal Laws, the contract between the United States Government and the State of Idaho, and the laws of Idaho, and it being an elementary principle of law that all laws must be considered as made a part of the contract, there could be no default on the part of the settler until the construction company has complied with and carried out its obligations under the Federal law, the contract between the Federal and State Governments, and state laws; and all provisions concerning the dates at which purchasers of water contracts must make their payments must be read as beginning after the Construction Company has reclaimed the lands involved, or in other words, if the contract provides that the first payment shall fall due in March, 1911, and subsequent installments in March of each following year; if the company does not reclaim the land until 1921, the first installment or payment must be read as falling due in March, 1922, and the balance in installments falling due in March of each subsequent year.

Appellant is therefore, in the position where its only remedy in a court of equity is for the enforcement of its general lien upon the entire system, and the apportionment of the same among the

various settlers as against the individual purchasers of land, and against their UNDIVIDED INTEREST IN THE DIVERSION WORKS AND ENTIRE SYSTEM.

In the event that all of the water of the Salmon system is applied to the 35,000 net acres of land, and that land patented and the water taken away from the unpatented lands, it is strictly important and is within the fundamental rules of equity that equitable adjustments, settlements and apportionments be made as between those furnished water and those deprived of water, and without these various interests before the court a complete remedy cannot be given.

Further than that, the question is raised by answer as to the amount expended by the Construction Company.

All of which said questions, in order that a multiplicity of suits be avoided, and an equitable apportionment be made as between the defendants in this action of the amount due, make each purchaser of a water contract, and each purchaser of lands, not only a necessary but an absolutely indispensable party defendant. This question is properly raised by the answer at the threshold of the case.

Equity Rules, 29, 37, 43-44.

Daniels Chancery Pleading & Practice, Vol. 1, 4th Edition, page 287.

Story's Equity Pleading, 9th Edition. Sec. 541, page 433, citing Mitf. Eq. & Pl. (Jeremy; Cooper Eq. Pl.).

Story vs. Livingston, 13 Peters 359 (10 L. Ed. 200).

Opinion of Chief Justice Marshall in *Hunt et al vs. Wickliffe,* 2 Peters 201, (7 L. Ed. 397).

Shields et al vs. Barrow, 17 How. 130 (15 L. Ed. 158).

It is highly proper that the court should require all purchasers of land and of water contracts to be brought into one action, as the amount involved is sufficient to bring the action within the jurisdiction of the Federal court, and it is immaterial how small the amount owing by any settler may be.

New Orleans Pac. R. R. Co., et alls, vs. John D. Arthur, 145 U. S. 62 (36 L. Ed. 66).

McDaniel vs. Craylor, 196 U. S. 415 (49 L. Ed. 533).

Handley et alls vs. Stutz et als, 137 U. S. 366 (34 L. Ed. 706).

Green Co. vs. John Thomas's Executor, 211 U. S. 598 (63 L. Ed. 343).

Troy Bank of Troy Ind., vs. Whitehead & Co. 222 U. S. 39 (56 L. Ed. 81).

It is proper that the court should take jurisdiction of this entire controversy in one action, irrespective of the residence of the parties, because, as hereinabove stated, a Federal statute is the foundation upon which this alleged lien and con-

troversy arises, and the court has jurisdiction irrespective of residence.

Ames vs. Kansas; Kansas Pac. R. R. Co. vs. Kansas, 111 U. S. 449 (28 L. Ed. 482).

Starin vs. N. Y. City, 115 U. S. 248 (29 L. Ed. 388).

Osborn et al vs. The Bank of the U. S., 9 Wheat. 738 (6 L. Ed. 204-243).

State of Oregon vs. Three Sisters Irrigation Company et al, 158 Fed. Rep., page 330.

U. P. R. R. Co. vs. Myers, 115 U. S. 610 (29 L. Ed. 319).

According to Section 1026, U. S. Compiled Statutes of 1918, compact Edition, the trial courts acquire jurisdiction over all purchasers of land and water rights living in the State of Idaho by personal service, and of non-residents by order of publication, so far as the enforcement of a lien is concerned, and against those residing in the State the court can enter a deficiency judgment.

In those jurisdictions in which the state as well as the Federal courts have a separate and distinct equity and common law practice, these questions which give concern to appellant would not be considered seriously.

It would appear to be a very simple matter, for the reason that a bill in chancery setting forth the same questions raised by appellant in the court below would suffice, with the addition that the names of the respective purchasers of land and

water rights would be set forth, together with a brief description of their lands, and the allegation that appellant claims a certain amount as due for construction work and that each defendant owes a certain amount, that patent here issued for 35,000 acres, and asking that they be required to pay, and that equity be done toward those eliminated from the segregation if deprived of an interest in the diversion works and waters, and asking that the amount apportioned as against each settler's interests in the system, and against his holdings and lands be decreed a lien as to the patented lands and the lien enforced.

And as to the defense of which counsel seems fearful, upon a reference by the court to a referee, each defendant could appear and make his claim for damages by reason of any failure on the part of the construction company to carry out its contract, or set up any other claim which he might have, and each claim be reported upon in the general findings of the referee, and exceptions made in behalf of each defendant, not satisfied, and these exceptions then passed upon by the court. There could be no complications, and the procedure would be comparatively simple and expeditious, and would result in a final settlement in one action, of all matters in litigation.

The court would not be attempting to assume the functions of the General Land Office, or the Interior Department, or the Land Office of the

State of Idaho, but would recognize the fact that the Secretary of the Interior and the Land Office have entire jurisdiction over the segregation until patent was finally issued, and that not until each patent was issued could the court interfere with the action of the Federal Government and then only for fraud, etc.

Michigan Land and Lumber Company, Ltd., vs. Rust, 168 U. S. 589 (42 L. Ed. 591).

Steel vs. St. Louis Smelting, Etc., Company, 106 U. S. 447 (27 L. Ed. 226).

United States Ex Rel Herman Knight vs. Lane, 220 U. S. 6 (57 L. Ed. 709).

Johnson vs. Towsley, 80 U. S. 72 (13 Wall. 72-9; 20 L. Ed. 485).

Lane, Secretary of the Interior, Pltff. in Err. vs. U. S. of America Ex Rel Mickadiet, etc., 241 U. S. 201 (60 L. Ed. 956).

Hawley vs. Diller, 178 U. S. 476 (44 L. Ed. 1157).

State of Minnesota vs. Land, Secretary, Etc., 247 U. S. 243-250 (62 L. Ed. 1098).

Utah Power and Light Co. vs. United States, 243 U. S. 389 (61 L. Ed. 791).

We respectfully submit that had the construction company and bondholders have complied with the provisions of the Federal Statutes, which clearly intended that the land should be reclaimed by an ample supply of water by the Construction Company, and then have obtained a patent and after patent issued have sold water rights and the

State have sold lands, this controversy would never have arisen. It is due entirely to the premature offering for settlement, and sale, of the lands and water rights. Had one unit at a time been reclaimed, and after actually ascertaining that there was ample water for that unit, then other units added, the full benefits and privileges of the Carey Act would have been realized. As has been said by the Supreme Court of the United States in the case of *Oregon & California Railroad Company et al,* Defendants and Appellants, *John L. Snyder et al,* Cross Complainants and Appellants, *William F. Slaughter et al,* Intervenors and Appellants, *vs. United States,* by Justice McKenna in delivering the opinion of the Court:

> "A direct and simple description of the case would seem to be that it presents for judgment a few provisions in two acts of Congress which neither of themselves nor from the context demand much effort of interpretation of construction."

Another statement of the court in this same case we feel is applicable to the case now in hand, to-wit:

> "We may observe again that the Acts of Congress are laws as well as grants and have the constancy of laws as well as their command, and are operative and obligatory until repealed."

The Court in the opinion further says:

> "In conclusion we cannot refrain from repeating that the case in its main principles

is not in great compass. It has been given pretension and complexity by the happening of the unforeseen, the lapse of time, change of conditions, and the contests of interests. These, however, are but accidents, giving perplexity and prolixity to discussion. Judgment is independent of them. It is determined by the simple words of the acts of Congress, not only regarded as grants, but as laws, and accepted as both; granting rights, but imposing obligations—rights quite definite, obligations as much so. The first had the means of acquisition; the second, of performance; * * * Certainly evasion of the laws or the defiance of them should not have been resorted to."

In the statement of this case, Justice McKenna says:

> "The persons who asserted interests acquired by actual settlement were made parties to this suit and the causes consolidated and Snyder and others filed cross complaints herein, setting up their alleged rights. And there were about 6,000 other persons who by the court were permitted as intervenors to present their claims for consideration and adjudication."
>
> *Oregon & California Railroad Company et al,* Defendants and Appellants; *John L. Snyder et al,* Cross Complainants and Appellants, *William F. Slaughter et al,* Intervenors and Appellants, *vs United States,* 238, U. S. 383-439 (59 L. E. 1360).

How is it possible for this action to become more complicated than was the above suit, in the

event this court sustains the action of the trial court in the decree appealed from?

RECAPITULATION

To recapitulate the questions involved in this appeal, we would state them as follows:

First. That the case in its main principles is not in great compass. It simply involves the proper construction and interpretation of Federal Statutes involving the Carey Act Projects as the fundamental and paramount law involved.

Second. The carrying out of the provisions of said laws, and of the contract between the Federal and State Governments by the Construction Company, and especially the provisions of the Federal Statutes and of the contract between the Federal and State Governments, whereby no interest or lien can be created or claimed by the State, Construction Company, or anyone whomsoever until the Construction Company has actually reclaimed the land within the segregation, or particular legal subdivisions thereof, and patent has issued.

Third. That the contract intered into between the Settlers and the Construction Company was founded upon, and its terms depended upon compliance with the Federal Statutes and the contract between the United States Government and the State of Idaho, by the reclamation of the land and the granting of patent as conditions precedent to

any payments by the settler to the Construction Company or its assignees.

Fourth. That the contract is not a mortgage, and cannot be enforced as a mortgage; it is not enforcible at all until patent is granted, then only by the special proceeding provided by the State law; that it simply provides for the execution of a mortgage, and until such mortgage is executed a court of equity has no general jurisdiction of the subject.

Fifth. That the institution of an action on behalf of the Construction Company, or its assignees, is premature until the Construction Company or its assignee (the appellant) shows that the Construction Company or appellant has reclaimed the land involved, according to the provisions of the Federal Statutes and the Contract between the United States Government and the State of Idaho.

Sixth. That even though patent is granted to a portion of the lands within the segregation, all settlers and water contract holders are indispensable parties defendant in order that a final adjudication may be made as to the undivided interest of each land owner in the diversion works and water system, and his rights be decreed according to the laws of the State of Idaho providing for the decreeing of water rights, the decreeing of water rights and the apportionment of water in said system being, upon principle, the same as the apportionment of a mortgage indebtedness as against

different alienees of various tracts therein bound by one mortgage, and that likewise the apportionment of the amount due the Construction Company as analagous to the enforcement of a mortgage executed by a grantor who has subdivided the entire tract and conveyed to similar alienees; that such was the practice of the high court of Chancery, as shown by the Citations from Story's Equity Jurisprudence and from Pomeroy's Equity Jurisprudence, the jurisdiction in equity of the Courts of the United States in the adjudication and enforcement of trusts are the same as in the High Court of Chancery in England, at the time of the passage of the judiciary act of 1789 (First Stat. 73, c. 20.)

Harrison vs. Moncramie, 264 Fed., at page 779.

And further that a court of equity's modes of relief are not fixed and rigid, but it can mold its remedies to meet the conditions with which it has to deal. The jurisdiction of a court of equity is the whole domain of conscience, limited only by legislative enactment. The faculty of equity must be energetic, productive and progressive.

Graselli Chemical Co. vs. Aetna Explosive Co., 252 Fed. 459.

Seventh. That the Federal Court can maintain jurisdiction of this action only upon the ground that it is for the purpose of enforcing the lien of appellant under the provisions of the Federal and State law; the terms and conditions of payment

as well as the amount of payment alone being governed by the contract entered into between the Construction Company and the purchasers of water rights, the said contract being made subordinate to and in the light of the provisions of the Federal Statute, the Federal and State Contract and the state laws, in the order named.

Eighth. That the Secretary of the Interior and the Commissioner of the General Land Office have sole jurisdiction as to the reduction in area (unless based upon fraud) until the final granting of patent, and that the jurisdiction of the Federal Court, with all parties before it is confined to the enforcement of the findings of the Interior Department and land office of the United States Government, except, as above stated, where fraud enters into the action of the department.

Ninth. That the decision of the Secretary of the Interior and the Commissioner of the General Land Office, as to the area to be finally embraced within the project and as to whether or not there is an ample supply of water for the reclamation of the lands does not effect the issues involved in this action as between the appellant and appellees. Their contract is based upon a definite amount of water at a definite price, together with an undivided interest in the entire irrigation system by appellees.

Tenth. That the court, with all parties before it, and only with all parties before it, has a right to

appoint a receiver and ascertain if other water is available for the purpose of reclaiming lands within the segregation and carrying out the terms of the contract between the Construction Company and the purchasers of water contracts and of lands.

Eleventh. That without all parties before the court in one action there is a multiplicity of suits, and an adjudication and complete justice cannot be done to any one or all of the purchasers of water contracts and lands within the segregation; there is a total inability on the part of a judicial tribunal to properly carry out and enforce the findings of the general land office and Interior Department in regard to the elimination of lands and the application of water to the patented area, the apportionment of costs to those benefited, and the apportionment of remuneration to those eliminated.

Respectfully submitted,

TURNER K. HACKMAN,
Solicitor for Appellees,

Residence: Twin Falls, Idaho.